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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

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RODERIC A. CARUCCI and  
SUZANNE CARUCCI

Case No. 3:09-cv-00712-RCJ-VPC

Plaintiffs

MOTION TO COMPEL ENFORCEMENT  
OF SETTLEMENT AGREEMENT

vs.

Removed action of 2nd Judicial District  
Court Case No. CV09-03165

WELLS FARGO HOME MORTGAGE, a  
division of WELLS FARGO BANK,  
N.A., a foreign entity; BANK OF  
AMERICA, a foreign entity; DOES 1-  
10, inclusive, and all other persons  
unknown claiming any right title,  
estate, lien or interest in the real  
property described herein.

Defendants

COME NOW, plaintiffs, Roderic A. Carucci, and Suzanne Carucci, by and  
through counsel, Christopher P. Burke, Esq., and file the following motion to  
Compel Enforcement of the Settlement Agreement which was negotiated at the  
January 14, 2011 foreclosure mediation hearing. The Plaintiffs believe the following  
facts are undisputed:

1. On January 14, 2011 the Plaintiffs filed a motion to amend their  
complaint to add additional claims for relief (Docket No. 46).

1           2.     On January 14, 2011, Wells Fargo and the Plaintiffs participated in a  
2     foreclosure mediation hearing where an agreement was reached to allow a short  
3     sale of the subject property.

4           3.     Brian Fuhr, a representative of Wells Fargo appeared at the mediation  
5     hearing by telephone.

6           4.     Donna Osborn represented she had full authority to negotiate the  
7     terms of the short sale on behalf of her client, Wells Fargo.

8           5.     The terms of the agreement were as follows:

9           A.     Wells Fargo would accept the pending offer of \$450,000.00,

10          B.     Mr. Carucci would provide a 3 month profit and loss for his law  
11          practice, and 2 months bank statements.

12          C.     Wells Fargo would release the Plaintiffs from all liability on the  
13          underlying note and deed of trust.

14          6.     Based upon this agreement, the parties agreed to stay litigation in this  
15     Court so the short sale could be completed. On February 4, 2011 this Court entered  
16     an Order approving the stipulation (Docket No. 48). This Order further directed the  
17     parties to file a joint status report regarding the status of the short sale on or before  
18     April 4, 2011.

19          7.     Mr. Carucci personally delivered the profit and loss report and the  
20     bank statements to Donna Osborn on January 14, 2011.

21          8.     The profit and loss report and the bank statements reflected income  
22     and expenses for the period of time which was consistent with Mr. Carucci's  
23     historical earnings for the past year.

24          9.     On February 9, 2011 Donna Osborn sent an email to Mr. Carucci and  
25     his Realtor which informed each that Wells Fargo has refused to accept the  
26     \$450,000.00 offer.

27          10.    Ms. Osborn, in the same email, instructed Mr. Carucci and his Realtor  
28     to make a counteroffer to the third party of \$489,000.00 and to contribute the sum

1 of \$10,000.00. A true and correct copy of this email has been attached to the  
2 Affidavit of Roderic Carucci as Exhibit "1".

3 11. The buyer refused to accept the counteroffer.

4 12. In an attempt to prevent the sale from falling through, Mr. Carucci's  
5 Realtor, Michelle Plevel, offered to reduce her own commission to 5%. She was also  
6 able to convince the buyer to contribute an additional \$7,500.00.

7 13. On March 2, 2011 Ms. Plevel sent an email to Donna Osborn informing  
8 her of these facts. A true and correct copy of this email has been attached to the  
9 Affidavit of Michelle Plevel as Exhibit "1".

10 14. March 2, 2011 Ms. Osborn spoke to Ms. Plevel and told her an  
11 additional \$17,500.00 was required to close the deal.

12 15. On March 3, 2011 Ms. Plevel called Brian Fuhr. He informed her that  
13 Wells Fargo had closed their file on the short sale as of February 17, 2011.

14 16. The buyers withdrew their offer and the pending transaction fell  
15 through as a result.

#### 16 Analysis

17 An attorney has the apparent authority to bind a client even if the client  
18 refuses to subsequently sign the agreement negotiated by the attorney. In May v.  
19 Anderson, 119 P.3d 1254, 121 Nev. 668, (Nev. 2005) the Mays' attorney accepted a  
20 settlement which included a full release of all claims. His clients refused to execute  
21 the documents or accept payment. They wanted to pursue others who may have  
22 been culpable in the accident. Because their attorney had authority to settle the case,  
23 the district court enforced the agreement and compelled compliance by dismissing  
24 the Mays' action. The Supreme Court affirmed, holding the attorney bound the  
25 client.

26 Specific performance is available when the terms of the contract are definite  
27 and certain, the remedy at law is inadequate, the plaintiff has tendered performance  
28

1 and the court is willing to order it. Stoltz v. Grimm, 689 P.2d 927, 100 Nev. 529,  
2 (Nev. 1984), citing Carcione v. Clark, 96 Nev. 808, 618 P.2d 346 (1980).

3 In the case at bar, the subject matter concerns unique real property. The terms  
4 are definite and certain. i.e. the Plaintiffs shall procure a buyer for \$450,000.00 and  
5 Wells Fargo does not have to foreclose or litigate whether or not it has the right to  
6 foreclose. There was one condition. Mr. Carucci was to provide current financial  
7 documentation to demonstrate he is earning no more than he has historically  
8 earned. He isn't. He met the condition and procured the buyer. It is Wells Fargo  
9 who broke the agreement.

10 Should Wells Fargo contend the modification is unenforceable due to the  
11 statute of frauds, the Plaintiffs' performance excuses the requirement of a writing.

12 This issue came up in In re Desert Enterprises, 87 B.R. 631, (Bkrtcy. D. Nev.  
13 1988). The matter before the bankruptcy court was a claim objection. A note secured  
14 by real property was to be assumed, but the holder wanted to raise the interest  
15 from 10% to 15% in consideration of the assumption. While assumption documents  
16 were sent, none were signed. Nevertheless, the debtor made some of the increased  
17 payments. The court held that under Nevada law, a written contract may be orally  
18 modified by the parties. The note came within the statute of frauds because it was  
19 secured by a deed of trust. The court held the doctrine of part performance was a  
20 recognized exception to the statute of frauds, and the exception applied to the  
21 modification of the interest rate.

22 The bankruptcy court cited Summa Corp. v. Greenspun, 96 Nev. 247, 607 P.2d  
23 569 (1980) which sets forth the doctrine of part performance. It applies where (1) the  
24 terms of the oral agreement are definitely established, (2) the acts of the performing  
25 party are done with a view to the agreement being performed, and (3) the party  
26 seeking to enforce the agreement has performed or is ready and willing to perform  
27 the essentials of the agreement on his part. Id 87 B.R. at 634.

1 In the case at bar, the terms of the modification agreement with Wells Fargo  
2 are clearly established. Even though Wells Fargo rejected the \$450,000.00 offer, the  
3 Plaintiffs used their best efforts to keep the deal on the table. These acts were  
4 performed by the Plaintiffs with a view to the agreement being enforced. Last, the  
5 Plaintiffs are still willing to perform the essentials of their agreement and sell the  
6 home for \$450,000.00. This agreement is enforceable.

7 Should Wells Fargo decide that it no longer wants to sell the subject property  
8 for \$450,000.00, then the Plaintiffs are entitled to a full discharge of their obligations  
9 under the note.

10 The failure to tender timely performance can constitute a material breach of  
11 contract. Goldston v. AMI Investments, Inc., 655 P.2d 521, 98 Nev. 567, (Nev. 1982). If  
12 a party is unable to perform due to mis-conduct on the part of the other party, then  
13 the first party is entitled to enforce the contract in spite of his delay. Id 98 Nev. 569-  
14 570.

15 Applying this doctrine to the case at bar, the Plaintiffs performed. They could  
16 not consummate the sale because Wells Fargo refused to consent to the sale its  
17 lawyer had previously authorized. Therefore, the Plaintiffs are entitled to the  
18 benefit of the bargain - a discharge of any deficiency claim under the secured note.

### 19 Conclusion

20 Donna Osborn is an officer of this Court. She represented she had absolute  
21 authority to settle this matter at the foreclosure mediation conference. Brian Fuhr  
22 ratified her authority by failing to object. Ms. Osborn proceeds to negotiate an  
23 agreement which is subsequently performed by the Plaintiffs. Wells Fargo refuses  
24 to perform. Ms. Osborn either never had actual authority or Wells Fargo feels that  
25 it cannot be bound by agreements or the statutory foreclosure mediation scheme  
26 which is the law of the State of Nevada. Either alternative is unjust. For those  
27 reasons, the Plaintiffs respectfully request an order from this Court compelling  
28

1 Wells Fargo to honor the deal it negotiated or to simply release the Plaintiffs from  
2 all liability under the secured note. Plaintiffs further request an award of attorney's  
3 fees to compensate them for having to bring this motion based upon the  
4 Defendants' bad faith.

5  
6 Dated: This 22 day of April, 2011

7  
8 By: 

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12 Nevada Bar Number 004093  
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